Supreme Court, U.S.
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NO. 86-1034

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

COMMONWEALTH OF VIRGINIA,

Appellant,

v.

AMERICAN BOOKSELLERS, ASS'N, INC., *ET AL.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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DOCKET ENTRIES
DISTRICT COURT RECORD

DATE	NR.	PROCEEDINGS
Jul 16	1	COMPLAINT—filed.
Jul 16	2	NOTICE returnable 7-19-85 together with restraining order and MOTION for a preliminary injunction; affidavits of Heather Florence, Helen Ross, Carol Johnson and Amy Bush; MEMORANDUM of points and authorities in support of temporary restraining order and motion for prel inj.—filed by pltfs.
Jul 16	3	ORDERED that Lloyd Thompson be and hereby is authorized and appointed to serve the above process (JCC) Entered and filed. Copy sent.
Jul 16	--	SUMMONS (orig. and 2) issued and given to Lloyd Thompson to serve.
Jul. 18	4	MEMO. in opposition to application for TRO and preliminary injunction filed by deft. Strobel.
Jul 19	5	RETURN on service by Lloyd Thompson executed 7-16-85 as to both defts.
Jul 19	--	TRIAL PROCEEDINGS: Williams, J. Linnell, R. Matter came on for pltfs' motion for TRO and for PI. Counsel appeared and argued same. Case to be continued and if either deft jurisdiction attempts to enforce the law then TRO shall issue upon request by pltfs. Pltfs' counsel to prepare order.

Jul 22 6 ORDER and CERTIFICATION of Constitutional Question, ordering that the application for TRO is continued, based upon representations by defense counsel that defts will voluntarily refrain from enforcing said amendment pending further proceedings herein; counsel for pltfs may by telephone, renew their request for interim relief in the event circumstances so warrant; ordered that the fact that this action questions the constitutionality of a statute of the Commonwealth of VA be, and hereby is, certified to the Attorney General of the Commonwealth, who shall be provided copies of the complaint and motions filed herein, and be permitted to intervene on behalf of the Commonwealth, ***; further ordered that the Attorney General advise the Court and all counsel, of his decision regarding intervention no later than July 26, 1985; in the event the Attorney General does intervene, he shall file any pleadings and memoranda by August 2, 1985; and hearing for a preliminary injunction is scheduled for 10:00 am on August 9, 1985—entered and filed. (RLW) Certified copies to counsel.

Jul 26 7 MOTION to intervene; MEMORANDUM IN support of same—filed by Att. General

Jul 29 8 ORDERED that the Court alters the schedule of this case as follows: the named defts' time for answering pltfs' complaint is continued until further notice by the Court; defts. are to file all

pre-trial motions and accompanying briefs no later than August 16, 1985; to file their written response to defts' motions no later than August 30, 1985. The Court will take evidence and hear argument motions on September 5, 1985 at 12:00 p.m. (RLW) Entered and filed. Copies sent.

Aug 16 9 MOTION to dismiss; BRIEF in support of same—filed by Attorney General.

Aug 30 10 MEMORANDUM of law in opposition to defts' motion to dismiss—filed by pltfs.

Sep 05 -- TRIAL PROCEEDINGS: Williams, J. Linnell, R. Matter came on for pretrial motions. Counsel appeared. Evidence was adduced and the parties rested. Closing arguments were made. A memorandum opinion and order shall issue next week.

Sept 10 11 MEMORANDUM OPINION (RLW) Entered and filed. Copies sent.

Sept 10 12 ORDER in accordance with Memorandum Opinion that the defts' motion to dismiss is GRANTED as to pltfs Jessica and Amy Bush, and DENIED as to the other pltfs. Furthermore, for reasons stated in accompanying memorandum opinion, the Court finds in favor and PERMANENTLY ENJOINS the defts. from forcing the amendment. (RLW) Entered and filed. Copies sent.

Sept 16 13 NOTICE of appeal of order of 9-10-85—filed by Commonwealth of Virginia. Copy of notice, docket sheet and order to USCA and opposing counsel.

Sept 23	14	NOTICE of filing appeal of order of 9-10-85—filed by deft. William K. Stover. Copy of notice, docket sheet and order to USCA and opposing counsel.
Sept 30	15	APPLICATION for costs—filed by pltfs.
Sept 30	16	AFFIRMANCE of Robert Plotkin in support of application for attorney's fees and costs—filed.
Sept 30	17	AFFIRMANCE OF Victor M. Glasberg in support of application for attorney's fees and costs—filed.
Oct 8	18	MEMORANDUM relating to pltfs' application for costs—filed by deft. Strobel.
Oct 9	19	OBJECTION to and motion to reduce pltfs' application for costs—filed by Stover.
Oct 9	10	OBJECTIONS to pltfs' application for award of attorney's fees—filed by Commonwealth of VA.
Oct 9	21	BRIEF in support of objections to pltfs' application for award of attorney's fees—filed by Commonwealth of Va.
Oct 16	22	SECOND affirmance of Victor M. Glasberg —filed.
Oct 23	23	ORDERED for the reasons stated below, the Court DENIES pltf's application and disallows all fees. (RLW) Entered and filed. Copies sent.
Nov. 4	24	NOTICE returnable (no date) for hearing MOTION for reconsideration; MEMO.; AFFIDAVIT of Michael A. Bamberger —filed by pltfs.

Nov. 19 -- TRIAL PROCEEDINGS: Williams, J., Halasz, OCR. Parties by counsel. Matter came on for hearing on pltfs' motion for atty. fees. Motion heard: denied.

Nov 19 25 MOTION For extension of time within which to file application for costs filed by pltfs. on 9-19-85.

Nov 19 26 RESPONSE to Pltfs' motion for reconsideration of denial of attorneys' fees filed by Commonwealth of Va. on 11-14-85.

Nov 19 27 BRIEF in support of Commonwealth of Va's response to motion to reconsider denial of attorneys' fees filed on 11-14-85.

Nov 19 Vol II TRANSCRIPT of hearing on 9-5-85 filed on 11-15-85.

Nov 19 28 ORDERED that pltfs' motion for reconsideration of denial of attorneys fees is DENIED. (RLW) Entered and filed. Copies sent.

Nov 19 29 MOTION In opposition to the granting of injunctive relief, MOTION to dismiss and objection of William K. Stover filed by deft. Stover on 7-18-85.

DOCKET ENTRIES
RECORD OF THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT
NO. 85-1961

DATE	FILINGS PROCEEDINGS
9 20 85	Case docketed. Awaiting ROA.
9 24 85	ORDER requiring single brief per side.
9 30 85	I S PURCHASE ORDER rec'd by Linnell 9 17 85 filed.
10 2 85	DISCLOSURE STMNT, A, N, filed.
10 2 85	MOTION (J-7) As to expedite briefing and argument, filed
10 2 85	MOTION (J-8) of A-William A. Stover for leave to submit a separate brief, filed
10 3 85	ORDER cons. 85-1961 and 85-1999 filed.
10 10 85	MEMORANDUM of A-Commonwealth of Virginia in support of motion (J-7) to expedite, filed
10 10 85	MEMORANDUM of A-Stover in response to A-Commonwealth of Virginia's motion (J-7) to expedite, filed
10 10 85	RESPONSE of A-Commonwealth of Virginia to A-Stover's motion (J-8) for leave to file separate brief, filed
10 11 85	DISCLOSURE STMNT, Stover, N, filed.
10 16 85	TRANSCRIPT PURCHASE ORDER received by N. Linnell on 10 10 85, filed.
11 25 85	DISCLOSURE STMNT, Nat'l Assn. of College Stores and Periodical Distributors Assn., N, filed.

11 26 85 MOTION (J-7) of A Stover, for leave of Court to submit a separate brief, filed.

11 26 85 MOTION (J-8) of A to expedite briefing and oral argument, filed.

11 27 85 ORDER granting motions of As to expedite briefing and oral argument and A-Stover to file separate brief; the combined length of Commonwealth of Va. and Stover briefs shall not exceed 50 pages; expedited briefing schedule BRF & JNT APPX of Commonwealth of Va. and Stover due 12 17 85, Es due 1 6 86, As' reply brief due 1 16 86; tentatively calendared for February term, filed. Copy to Smith-McLees; Glasberg; Tramblian; Bamberger; Plotkin

11 27 85 DISCLOSURE STMNT (Partial) for Assn. of American Publishers, Y, filed.

11 29 85 DISCLOSURE STMNT, Books Unltd. and Ampersand Books, N, filed.

12 04 85 DESIGNATION, (Commonwealth), of parts of ROA to be included in the joint appendix, filed.

12 06 85 LETTER directing E's to fle a final list of all associations and affiliates by 12 13 85. Copies to all counsel.

12-12-85 JOINT MOTION (M-67) to alter briefing schedule, filed

12-16-85 ORDER granting motion M-67, As' opening brief due 12-19-85, filed. Copy of order sent to Smith-McLees; Tramblian; Bamberger and Plotkin.

01 07 86 ORDER consolidating cases 85-1961(L), 85-1999, 85-2284 for briefing and oral argument, filed.

01 10 86 DISCLOSURE STMNT. Commonwealth of VA., N. filed.

01 10 86 STIPULATION that volume 2 of the joint appendix shall include stipulated documents. filed.

01 14 86 DISCLOSURE STMNT. Strobel, N. filed.

6 26 86 PETITION (D-159) FOR REHEARING & SUGG. FOR REHEARING IN BANC of William K. Stover. filed.

6 30 86 Transmitted petition (D-159) to JDP JMS CFH w copy to all active circuit judges on 6 30 86.

06 25 86 Bill of costs. A. filed.

07 11 86 Objections to bill of costs. Defendant (Charles T. Strobel); filed.

07 18 86 ANSWER (D-159) of Es' to Stover's petition for rehearing and suggestion for rehearing in banc. filed (SAR:cw) Transmitted to JDP JMS CFH with copies to all active circuit judges on 07 21 86.

09-26-86 ORDER denying Stover's petition for rehearing and suggestion for rehearing in banc. filed (SAR:cw) Copy to Smith; Bamberger and Plotkin.

10 02 86 MOTION (D-211) of Commonwealth of VA to stay the mandate. filed. Transmitted to JDP JMS CFH. Telephone call made to alert them to its arrival.

10 3 86 MOTION (D-212) of Stover to stay mandate. filed. Transmitted to JDP, JMS, CFH, SAR:cb

10 07 86 ORDER granting motions for stay of mandate. filed. Copies to counsel on 10 08 86.

10 08 86 RESPONSE in opposition of E's (D-211) to Commonwealth of Va's motion to stay mandate, filed SAR:cb. Transmitted to JDP, JMS, CFH

10 09 86 NOTICE OF APPEAL TO THE SUPREME COURT, filed.

01 15 87 Supreme Court Certificate of Docketing (on 12 24 86) filed.

NO. 85-1999

DATE	FILINGS - PROCEEDINGS
9 30 85	Case docketed. Awaiting ROA.
10 3 85	ORDER cons. 85-1961 and 85-1999 filed.

---

10 3 85 SEE (L) 85-1961 FOR FURTHER PROCEEDINGS.

6 26 86 PETITION (D-159) FOR REHEARING & SUGG. FOR REHEARING IN BANC of William K. Stover, filed.

6 30 86 Transmitted petition (D-159) to JDP JMS CFH w copy to all active circuit judges on 6 30 86.

07 18 86 ANSWER (D-159) of Es' to Stover's petition for rehearing and suggestion for rehearing in banc, filed (SAR:cw) Transmitted to JDP JMS CFH with copies to all active circuit judges on 07 21 86.

09-26-86 ORDER denying Stover's petition for rehearing and suggestion for rehearing in banc, filed (SAR:cw) Copy to Smith; Bamberger and Plotkin.

10 02 86 MOTION (D-211) of Commonwealth for stay of the mandate, filed. Transmitted to JDP, JMS,CFH. Telephone call made to alert panel t. its arrival.

10 07 86 ORDER granting motions for stay of mandate, filed. Copies to counsel on 10 08 86.

10 8 86 RESPONSE in opposition of E's (D-211) to Commonwealth of VA's motion to stay mandate, filed. SAR:cb TRANSMITTED response to JDP, JMS, CFH.

NO. 85-2284

DATE FILINGS—PROCEEDINGS

12 23 85 Case docketed. ROA filed on 12 03 85.

01 07 86 ORDER consolidating cases 85-1961(L), 85-1999, 85-2284 for briefing and oral argument, filed.

CONSOLIDATED SEE 85-1961(L) for further proceedings.

6 26 86 PETITION (D-159) FOR REHEARING & SUGG. FOR REHEARING IN BANC of William K. Stover, filed.

6 30 86 Transmitted petition (D-159) to JDP JMS CFH w copy to all active circuit judges on 6 30 86.

07 18 86 ANSWER (D-159) of Es to Stover's petition for rehearing and suggestion for rehearing in banc, filed (SAR:cw) Transmitted to JDP JMS CFH with copies to all active circuit judges on 07 21 86.

09-26-86 ORDER denying Stover's petition for rehearing and suggestion for rehearing in banc, filed (SAR:cw) Copy to Smith; Bamberger and Plotkin.

10 02 86 MOTION (D-211) of Commonwealth for stay of the mandate, filed. Transmitted to JDP, JMS, CFH. Telephone call made to alert panel to its arrival.

10 07 86 ORDER granting motions for stay of mandate, filed. Copies to counsel on 10 08 86.

10 8 86 RESPONSE in opposition of E's (D-211) to Commonwealth of Va's motion to stay mandate, filed SAR:cb Transmitted response to panel.

COMPLAINT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action No. _____

CIVIL RIGHTS COMPLAINT FOR
DECLARATORY AND INJUNCTIVE RELIEF

AMERICAN BOOKSELLERS ASSOCIATION, INC.,
122 E. 42nd Street
New York, New York 10017

ASSOCIATION OF AMERICAN PUBLISHERS
1707 L Street, N.W.
Washington, D.C. 20036

COUNCIL FOR PERIODICAL
DISTRIBUTORS ASSOCIATION
488 Madison Avenue
New York, New York 10022

INTERNATIOAL PERIODICAL
DISTRIBUTORS ASSOCIATION, INC.
341 Madison Avenue
New York, New York 10017

NATIONAL ASSOCIATION OF
COLLEGE STORES, INC.
528 E. Loraine Street
Oberlin, Ohio 44074

BOOKS UNLIMITED, INC.
2729 Wilson Boulevard
Arlington, Virginia

AMPERSAND BOOKS
118 King Street
Alexandria, Virginia

AMY BUSH
615 Oakley Place
Alexandria, Virginia

JESSICA BUSH
615 Oakley Place
Alexandria, Virginia
a minor by and through
Amy Bush, her legal
guardian

Plaintiffs,

v.

CHARLES T. STROBEL
Director, Public Safety
City of Alexandria
400 N. Pitt Street
Alexandria, VA 22314

WILLIAM K. STOVER
Chief of Police
County of Arlington
2100 N. 15th Street
Arlington, VA 22201

Defendants.

NATURE OF THE CASE

1. This action seeks preliminarily and permanently to enjoin enforcement of, and to declare facially unconstitutional, and void an Amendment to Section 18.2-391 of the Code of Virginia, effected by Chapter 506 (hereinafter the "Amendment"), on the grounds that it is unconstitutional under the United State Constitution. The Amendment, formerly House Bill No. 1546 became effective on July 1, 1985. A true and correct copy of the Amendment is attached and incorporated hereto as Exhibit A. The language challenged herein as unconstitutional is italicized in Exhibit A.

2. Original Section 18.2-391, enacted in 1975, is part of an enforcement scheme designed to regulate the access of minors to certain sexually-oriented materials believed to be harmful to juveniles by making illegal the sale or loan of such material to juveniles. In March, 1985 the General Assembly of Virginia amended § 18.2-391, extending its prohibitions to the display of such material in any retail establishments, even if patronized legally by minors. The Amendment, by its terms, applies to every bookstore and retail establishment in Virginia where minors may be admitted that offers for sale any printed or visual material, including the covers and book jackets of, advertisements for, and the text of every book sold in this state, without regard to whether the material is obscene as to the adult patrons of these establishments.

3. This Amendment, pertaining to the display of non-obscene materials, presumably intended to further the state's interest in protecting its youth, is not narrowly drawn to further the state's avowed purpose and is unconstitutional in that:

(a) It imposes an unconstitutional prior restraint on the availability, display and distribution of constitutionally protected, non-obscene materials to both adults and minors in all establishments that sell books, magazines or other printed or visual forms of expression;

(b) It is unconstitutionally overbroad;

(c) It is unconstitutionally vague.

JURISDICTION

4. This action arises under 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201, 2202, and the First, Fifth and Fourteenth Amendments to the United States Constitution, as hereinafter more fully apears. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1331, 1343(3) and 1343(4). Venue is proper pursuant to 28 U.S.C. § 1391.

PLAINTIFFS

5. The plaintiffs in this action are or represent citizens of Virginia, publishers, wholesalers, retailers, and distributors of books, magazines or newspapers in the State of Virginia, and, in particular, in the County of Arlington and City of Alexandria. The rights and other legal relations of the plaintiffs will be affected by the Amendment, unless it is enjoined.

(a) Plaintiff American Booksellers Association, Inc., is a trade association composed of booksellers located throughout the United States. The Association has approximately 4,500 members, consisting of more than 7,000 private bookstores, department store book stores, and chain book stores, including numerous outlets in the State of Virginia.

(b) Plaintiff Association of American Publishers, Inc., is a trade association organized under the laws of the State of New York. It is the major national association of publishers of general books, textbooks, and educational materials in the United States. Its members publish the vast majority of all general, educational, and religious books and materials produced in the United States, which are sold and distributed to schools, universities, and libraries, and through thousands of book stores, department stores, drug stores, newsstands, and other outlets throughout the United States, including the State of Virginia. The Association has in excess of 300 members, virtually all of whom publish materials sold in the State of Virginia.

(c) Plaintiff Council for Periodical Distributors Association is a national trade association of over 500 independent local wholesaler distributors of magazines, comic books, paperback books, and newspapers. The Council has numerous members in the State of Virginia.

(d) Plaintiff International Periodical Distributors Association, Inc. is the trade association for the principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to wholesalers throughout the United States, for ultimate distribution to retailers and the public.

(e) Plaintiff National Association of College Stores, Inc., is a trade association of college stores located throughout the United States. The Association has approximately 2500 members, including several members in the State of Virginia.

(f) Plaintiff, Books Unlimited, Inc., is a general retail bookstore located at 2729 Wilson Boulevard, Arlington, Virginia.

(g) Plaintiff Ampersand Books is a general retail bookstore located at 118 King Street, Alexandria, Virginia.

(h) Plaintiff Amy Bush, Ph.D., resides in Alexandria, Virginia and holds a doctorate in education and counseling. She is a frequent customer of retail outlets where books are sold in Northern Virginia. In addition, she has a professional interest in, and need for, material relating to child and spouse abuse and to other professional literature involving and diagnosis of, and treatment for, sexual dysfunction, marital discord and emotional disturbance.

(i) Plaintiff Jessica Bush is a minor, age 16, who resides in Alexandria, Virginia, and who frequently patronizes retail outlets in Northern Virginia where books are sold. This action is being prosecuted in her name and on her behalf, by her mother and lawful guardian, plaintiff, Amy Bush.

DEFENDANTS

1. (a) Charles T. Strobel is sued in his capacity as the Director of Public Safety in Alexandria, Virginia. He is the chief law enforcement official for that jurisdiction, and as such has responsibility for enforcing the laws of the Commonwealth of Virginia, including the Amendment, in Alexandria.

(b) William K. Stover is sued in his capacity as the Arlington, Virginia, Chief of Police. As police chief, he is responsible for enforcing the laws of the Commonwealth of Virginia, including the Amendment, in Arlington.

IRREPARABLE INJURY

7. There is no adequate remedy at law for the violation of plaintiffs' constitutional rights, and unless the requested injunctive and declaratory relief is granted, plaintiffs and their members will suffer immediate and irreparable loss.

COUNT I

RESTRICTIONS ON ADULT ACCESS TO CONSTITUTIONALLY PROTECTED MATERIAL

8. Under the First and Fourteenth Amendments to the United States Constitution adults, including plaintiff Amy Bush, have the right to view and purchase material within the scope of the First Amendment, including material which is not obscene.

9. It is not possible, under the terms of the Amendment, to restrict the display of materials covered by the Amendment to juveniles without also restricting such access by adults. The Amendment, by prohibiting retail establishments "to knowingly display for commercial purposes in a manner whereby juveniles may examine and peruse" non-obscene material, effectively requires booksellers to remove from their shelves substantial amounts of such

constitutionally protected matter, thereby restricting the right of adult customers to view, peruse and purchase protected literature.

COUNT II

RESTRICTION ON SPEECH (PRIOR RESTRAINT)

10. The Amendment requires the removal of constitutionally protected materials from readily viewed and accessible areas and proscribes having these materials accessible to minors. These restrictions constitute unlawful prior restraints of constitutionally protected speech.

11. The Amendment imposes restrictions on display and manner of distribution which necessarily will result in the removal from circulation of large quantities of materials constitutionally protected as to adults and as to minors in violation of the First Amendment.

12. The Amendment encourages all merchants, including plaintiffs here, selling printed materials to exclude from their establishments all persons under the age of 18 and thereby chills the rights of the plaintiffs to sell materials that are constitutionally protected as to minors or as to adults.

COUNT III

RESTRICTIONS ON MINORS' ACCESS TO CONSTITUTIONALLY PROTECED MATERIALS

13. Under the First and Fourteenth Amendments to the United States Constitution, minors, including plaintiff Jessica Bush, have the right to view and purchase any matter that is not obscene as to such persons.

14. The Amendment is unconstitutional because it prohibits retail establishments from displaying "in a manner whereby juveniles may examine and peruse" certain non-obscene materials, although said material may not be harmful as to all juveniles, depending upon their ages.

15. The Amendment severely inhibits and effectively precludes minors' access to protected material as to all juveniles, and thus the Act violates the constitutional rights of free expression of plaintiffs.

COUNT IV

DUE PROCESS (VAGUENESS)

16. The Amendment is unconstitutionally vague because it fails to provide fair notice as to what constitutes a criminal offense under the Amendment and of the persons or entities to which the Amendment applies, in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

17. The Amendment contains several words purporting to describe prohibited acts, which are vague and indefinite and subject to different meanings such that they fail to provide adequate notice of an offense under the Amendment, including the words "display," "harmful to juveniles" and "in a manner whereby juveniles may examine and peruse." The Amendment therefore violates plaintiffs' rights to due process under the Fifth and Fourteenth Amendment to the United States Constitution.

RELIEF

WHEREFORE, plaintiffs pray judgment against the defendants, and each defendant, as follows:

1. That this matter be set for hearing on the requested temporary and preliminary injunctive relief at the earliest practical date;

2. That the Court enter a preliminary and permanent injunction enjoining the defendants and each defendant, and the defendants' agents, attorneys, servants, employees, and other representatives, from enforcing, in any manner whatsoever, any provision of the Amendment;

3. That the Court enter a declaratory judgment that the Amendment is unconstitutional, void, and of no effect;

4. That plaintiffs be awarded the costs of this action;

5. That plaintiffs recover of defendants their reasonable attorneys' fees pursuant to 42 U.S.C. § 1988; and,

6. That plaintiffs be granted such other and further relief as the Court deems proper.

This 16th day of July, 1985.

Respectfully submitted,

/s/
Robert Plotkin
Michael A. Bamberger
FINLEY, KUMBLE, WAGNER, HEINE,
UNDERBERG, MANLEY, & CASEY
1140 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 659-8300

Counsel for Plaintiffs

/s/
Victor M. Glasberg
1007 King Street
P.O. Box 1610
Alexandria, Virginia 22313
(703) 684-1100

Local Counsel for Plaintiffs

REPRINT

1985 SESSION

VIRGINIA ACTS OF ASSEMBLY—CHAPTER 506

An Act to amend and reenact § 18.2-391 of the Code of Virginia, relating to prohibited sales and loans of obscene material to juvenile; penalty.

[H 1546]

Approved

Be it enacted by the General Assembly of Virginia:

1. That § 18.2-391 of the Code of Virginia is amended and reenacted as follows:

§ 18.2-391. Unlawful acts.—(a) It shall be unlawful for any person knowingly to sell or loan to a juvenile, *or to knowingly display for commercial purpose in a manner whereby juveniles may examine and peruse:*

(1) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts sexually explicit nudity, sexual conduct or sado-masochistic abuse and which is harmful to juveniles, or

(2) Any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (1) of this subsection, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse and which, taken as a whole, is harmful to juveniles.

(b) It shall be unlawful for any person knowingly to sell to a juvenile an admission ticket or pass, or knowingly to admit a juvenile to premises whereon there is exhibited a motion picture, show or other presentation which, in whole or in part, depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles or to exhibit any such motion picture at any such premises which are not designed to prevent viewing from any public

PUBLISHER'S NOTE

THE FOLLOWING PAGE IS UNAVAILABLE FOR FILMING

22

AFFIDAVITS

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action No.

AFFIDAVIT

AMERICAN BOOKSELLERS ASSOCIATION, INC., et al.,

Plaintiff,

v.

CHARLES T. STROBEL,
Director, Public Safety, et al.,

Defendant.

STATE OF NEW YORK)
)
COUNTY OF NEW YORK) SS.:

HEATHER GRANT FLORENCE, being duly sworn, deposes and says;

I am a Vice-President, Secretary and General Counsel for Bantam Books, Inc., a publisher of books in all formats, but best known as a publisher of mass market paperbacks, and the Chairman of the Freedom to Read Committee of the Association of American Publishers ("AAP"). I am a graduate of Radcliffe College in Cambridge, Massachusetts, and received my law degree from Columbia Law School. I am a member of the Bar of the State of New York and was in private practice in New York City prior to becoming General Counsel for Bantam Books. During the time I was in private practice, I did a great deal of work for the AAP,

serving as counsel for their Freedom to Read Committee from 1972 through 1975. Bantam Books is a member of the AAP.

On average, Bantam publishes 50 to 60 new titles each month. Approximately 90% of those works, as well as the thousands of paperbacks in print from previous years, are sold in retail outlets such as supermarkets, convenience stores, drug stores, variety stores, airports, lobbies of office buildings and department stores, in addition to traditional bookstores. Only approximately 10% are sold exclusively in the traditional bookstore environment.

Distribution of these materials by Bantam and other publishers is generally not made directly to the non-bookstore retailers, but rather, is made through a jobber or wholesaler. It is generally that wholesaler or jobber rather than the retailer himself who makes the selection of which materials will be carried in these stores.

Moreover, based on available research, the nature of the retail purchaser of mass market paperbacks is such that he or she rarely comes into a store knowing for certain what he or she will buy. Paperbacks are rarely reviewed by critics, so display in the store is essential to the success of a paperback. Accordingly, decisions are more often than not based upon impulse. Original paperbacks thus must be "noticed" on the shelves of a store in order to sell. The wisdom in the industry is that more than 1/2 of the sales of any given paperback results from either the displayed cover or other point-of-sale materials.

I have reviewed the Amendment to Section 18.2-391 of the Code of Virginia which is the subject of this litigation. In requiring a retailer who continues to allow persons under the age of 18 into his premises to remove from display any paperbacks which could be considered "harmful to minors," the First Amendment rights of adults to obtain mass-market paperbacks and other similarly non-pornographic and non-obscene materials will be severely infringed. The Amendment would force the retailer to

undertake the impossible task of reviewing in detail all of the materials he continues to sell in order to determine which could possibly be construed by a prosecutor as falling within the Amendment's proscriptions.

Even with my years of experience as a First Amendment lawyer, application of the "harmful to minors" definition to particular factual situations is virtually impossible. Most especially since the Amendment requires all persons under the age of 18 to be treated as a single group, notwithstanding that the maturity level of an 8-year old is substantially different from that of a 17-year old high school senior. Therefore, in the interest of being cautious, most retailers will probably remove from stock any borderline paperbacks making certain that nothing is offensive to even a beginning reader. This is especially so since given the nature of the paperback market, and that 90% of paperbacks are sold in general retail outlets as well as traditional bookstores, children cannot be banned from entering such premises.

Based upon my intimate knowledge of the book publishing industry and the nature and conduct of titles published, I can state without reservation that enforcement of the Amendment would result in the removal from the shelves of legitimate business establishments many materials that are neither pornographic nor obscene under any federal constitutional guideline, but would nevertheless fall within the Amendment's broad definition of "harmful to minors."

The effect of the Amendment to the Code of Virginia will be to restrict, if not eliminate entirely, the access of adults and minors to many mass market paperbacks, great works of literature, and other similar constitutionally protected materials. Accordingly, the Court should enjoin enforcement of the Act pending trial.

Sworn to before me this
9th day of July, 1984

NOTARY PUBLIC

HEATHER GRANT FLORENCE

SIDNEY LUBLANG
Notary Public, State of New York
No. 24-4622548
Qualified in Kings County
Commission Expires March 30, 19___

Affidavit of Helen G. Ross

1. My name is Helen G. Ross. I am the proprietor of Ampersand Books, which is a general retail bookstore located at 118 King Street in Alexandria, Virginia. Ampersand Books has been in business since 1977. My store sells new books. It is open to all members of the general public, including persons under the age of eighteen. Approximately 10% of our inventory is intended for children and adolescents, and this represents approximately 10% of our revenue.

2. Based upon my knowledge of, and experience with, the retail book business, and also based upon research surveys conducted by the book industry, it is my belief that the average retail purchaser, particularly of mass market paperbacks, enters a store uncertain about what book, if any, he or she may purchase. Furthermore, original paperback books are not routinely reviewed by critics in newspapers or magazines, so that purchase decisions about such books are made on impulse. For these and other reasons, the display of books, in store windows, in racks within a store, and upon the shelves of a store, is critical to the sale of books.

3. Because my store is frequented by minors, and because the display of books is essential to our business, I am concerned that the March, 1985 amendment to § 18.2-391 of the Virginia Code will interfere with our ability to obtain, display and sell books to our customers. As I understand the new law, it would require our store to remove from display any books that could be considered harmful to juveniles. Although I am uncertain as to the exact meaning of "harmful" in this context, I believe that it means that we will not be allowed to display any book or periodical if it contains a narrative description, or pictures, of sexual conduct or nudity.

4. It appears to me that this new law would require us to remove many books currently on the best seller list, many of our romances, as well as many enduring works of literature. Some non-fiction books, such as photography, art books, text books and professional literature could likewise not be displayed. Some books written specifically for minors would be prohibited, such as works by Peter Mayle, who is an acclaimed author of books designed to teach children about human reproduction and human sexuality. While some of these books could be inappropriate for an eight year-old, they might be very appropriate for a fourteen year-old.

5. Strict compliance with the literal terms of the new law is, in my opinion, impossible. The new law would greatly impact our selection of new books, as we would be hesitant to stock any material that, when displayed, might fall within its scope. The new law will also require us to review our entire inventory, and to remove at least 25% to 40% of our current titles to assure that we will not be prosecuted.

6. The only alternatives we see to such censorship of our inventory are two: (a) to restrict a portion of our store to an "adults-only" section, or (b) to prohibit minors' access to our store. Neither of these alternatives are acceptable or feasible because:

(a) Our store is small. We have barely enough room to display our stock at present, and it would be impossible to effectively segregate adult and juvenile books. In addition, the costs associated with the relocation of a large portion of our stock would be substantial. I also believe that our customers, many of whom are accompanied into our store by their children, would strongly object to such segregation, and would cease or reduce their patronage.

(b) It is likewise not feasible for us to restrict minors from our shop. We are located in an area where minors routinely shop, with or without their parents, and minors are frequent customers. As noted above, 10% of our stock is

devoted to juveniles, and the largest portion of such stock is neither "obscene" nor "harmful to juveniles" under any legal definition. Total exclusion would be difficult to enforce and would have serious economic repercussions on our business. Incidentally, our part-time employees often are high-school students under the age of 18. The law would, in effect, force us to discharge such employees rather than risk their exposure to works that could be considered "harmful" to them.

(c) Furthermore, it is my belief, based on current studies, that one of the greatest problems facing America today is illiteracy. Literacy and a free flow of ideas is essential to the maintenance of any democracy. Therefore, prohibiting or impeding the access of minors to book stores would not only adversely effect bookstore and publisher revenues; but, more importantly, would be harmful to the very segment of the public this law is supposed to be protecting, the children; and, therefore, would harm society as a whole.

7. Upon personal knowledge, as well as general information and belief, I understand that many of the same books that my store would be forced to remove from display are on display and available for perusal and loan in public libraries, accessible to juveniles, only blocks from our store.

8. For all these reasons, I believe the Court should restrain and enjoin the appropriate officials from enforcing the new Amendment, and should declare it to be a violation of my First Amendment right to disseminate non-obscene books and periodicals to the general public.

9. I swear under penalty of perjury that the above is true and correct and based on my personal knowledge and belief.

/s/
Helen G. Ross

Dated July 12, 1985

Affidavit of Carol Johnson

1. My name is Carol Johnson. I have lived in Arlington, Virginia, for 18 years. I have been an owner/manager of Books Unlimited, Inc. for 10 years. Books Unlimited is a general retail bookstore located at 2729 Wilson Boulevard. We are next door to a very large baby furniture store and across the street from Sears. Directly behind the store is one of the oldest neighborhoods in Arlington. The store is open to the general public, and our customers represent the broadest possible cross-section in terms of both age and taste.

2. Over the years we have become well known for, and have taken a great deal of time to develop, several areas of specialization. Among them is a children's section so large (35% of our floor space) and so diverse that it rivals most children's book only shops. I am thought of as an authority of sorts on children's literature and one member of my staff, Froma Lippmann, is a well known local authority on special subject books for children, such as those pertaining to death, divorce, and human sexuality. We have both done a great deal in the community, in and outside of the store, using this expertise.

3. Another area of specialization is our huge sections of books on childbirth and parenting, including a good selection of books on sex-education and children and teens. We carry a large selection of psychology and self-help books, including those pertaining to sexuality. The other areas of specialization are mysteries and suspense, the only broad selection of Judaica in Northern Virginia, and fiction. We carry 128 linear shelving feet of general backlist fiction, not including generic fiction, such as science fiction, romances, mysteries or best sellers, but including most of the works of well known authors such as Twain, Hemingway, Fitzgerald, Beattie and Rita Mae Brown.

4. Because of the diverse range of customers my store has cultivated, I am concerned that the March 1985 amendment to § 18.2-391 of the Virginia Code will vastly alter our ability to conduct business in our store. As I understand the new law, it would require us to remove from display any books we think might be considered "harmful to juveniles." I believe it means we will not be able to display or shelve any book or periodical which contains a narrative description or pictures of sexual conduct or nudity. We are concerned here about the vagueness of the terms "harmful" and "sexual conduct" and wonder who will determine what they constitute.

5. The book selection process is, at best, byzantine. Approximately 35,000 new titles are published in a year with 400,000 titles remaining in print on publishers' back lists. In some cases, all booksellers buy from is a list of titles with no descriptions, such as the microfiches sent out weekly and monthly from wholesalers. We buy also from publishers' catalogs. Often the catalog copy is flowery and misleading, designed to attract the store buyer, but not giving complete and accurate information on the books' contents. We also buy from publishers' sales representatives who cannot read every book they present, and often know only what they learn in sales conferences. This is all designed to get the books inside the bookstore, without necessarily giving a clear description of their contents.

6. Because the interpretation of the words "harmful" and "sexual conduct" is not clear to us, and because we cannot read all the books on our shelves nor properly screen new books, we are concerned that the new law would require us to remove from our shelves many books currently on the best seller lists as well as a great deal of modern literature. We are also concerned that display of parts of our sex education and self-help departments would not be allowed. Many well-known authors of young adult literature have dealt with the subject of sexual conduct in their novels, such

as Judy Blume and Norma Klein. These books are *not* appropriate for eight-year olds, but they are indeed appropriate for young people, ages 14 and up.

7. Strict compliance with the liberal terms of the new law would, in my opinion, totally affect the nature of our bookstore. We would have to remove or "butcher" at least three areas of specialization: parenting and psychology, fiction and mysteries. The new law would impact greatly on our selection of new books, as we would be hesitant to stock any material that would fall within its scope. This would make it impossible to remain competitive with stores in the District of Columbia, who would still be able to stock and display the works of bestselling authors such as Andrew Greeley, Robert Ludlum and Sidney Sheldon, while we would not.

8. We see two alternatives to such censorship of our inventory:

(a) To rope off all sections having literature we suspect to contain description of sexual conduct. This would mean censorship on our part, as well as an incredible inconvenience, both to us in terms of reorganizing our stock, and to our customers who would possibly be offended enough to discontinue patronizing our bookstore.

(b) To restrict minors from our bookstore. Since the greatest percentage (40%) of our business is done in children's books and we hold routinely special events such as authors reading from their own work or story telling especially for children, we could not remain in business. In addition to my own two children, we have three teenaged employees, all of whom would have to be discharged.

9. Based upon my personal knowledge, as well as my general information and belief, I understand that many of the same books that my store would be forced to discontinue displaying are on display and are available for perusal in public libraries accessible to juveniles only blocks from our store.

10. For all of these reasons, I believe that the court should restrain and enjoin the appropriate officials from enforcing the new amendment, and should declare it to be in violation of my First Amendment right to disseminate non-obscene books and periodicals to the general public.

11. I swear under penalty of pain and perjury that the above statements are true and correct, based upon my personal knowledge and beliefs.

s/
Carol Johnson

Dated: July 11, 1985

TRANSCRIPT EXCERPTS

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that are sort of indigenous to any First Amendment attack on a statute of this nature. And I pretty well understand the law on it. And I am ultimately going to hold that there is a case or controversy, and that some of these plaintiffs have standing. I rather suspect that the lady and her daughter who may have an abstract right to go into book stores and that sort of right but don't really, aren't really affected by this, that the two Bushes will come out of the case. But other than that, it will continue on apace.

Now, that brings us to the question of abstention. Do you want to submit that, or do you want to argue it?

MR. MCLEES: We will submit that, Your Honor please.

THE COURT: All right. And I rule that this is not an appropriate case for this Court to abstain, because there is no peculiar state law that needs interpreting by a state judge. And he won't have any more advantage than I have in trying to come to grips with this.

So, I deny the request that this Court abstain from considering the case out of deference to state courts.

Now, there are motions for summary judgment and other motions here. But I am not so sure that this case lends itself to disposition by summary judgment, because there are fact issues that I probably need to make specific findings of fact on before I can dispose of the case. And one, the importance of displaying a book, magazine, in order to sell it. And maybe without a proper record, all they do is Ping-Pong it back to me and I have to go back to square one and do my work all over again. So, I would just rather do it right in the beginning.

MR. MCLEES: I understand Your Honor's position. I would ask that the record note my exception.

THE COURT: All right, fine. Call your first witness.

MR. PLOTKIN: Plaintiff calls Helen Ross.

NOTE: The witness is sworn.

HELEN G. ROSS, a witness called by counsel for the plaintiffs, first being duly sworn, testifies and states:

DIRECT EXAMINATION

BY MR. PLOTKIN:

Q. Would you tell the Court your name and address, please.

A. Helen Ross.

THE COURT: And spell your last name.

THE WITNESS: R-o-s-s.

THE COURT: Thank you.

THE WITNESS: And I live in McLean, Virginia.

Q. And are you one of the named plaintiffs in this lawsuits?

A. Yes.

Q. Have you ever testified before?

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by Brentano's?

A. Well, first I was merely a clerk in the paperback department, and then I became a manager of the store after a year or so.

Q. Where was that store located?

A. The first one was in Spring Valley, Northwest D. C., and then Georgetown, a different store.

Q. This is in the District of Columbia?

A. Yes, in the District of Columbia.

Q. And at some point did you leave Brentano's for another endeavor?

A. Then I left Brentano's and looked around for a location for my own store.

Q. Did you find one?

A. Yes, an unfortunate one, but I found one in Bethesda, Maryland, and opened a store there, and also found my present location in Old Town, Alexandria.

Q. Are you a member of the American Booksellers Association?

A. Yes.

Q. What is the address of — What is the name of your book store?

A. Ampersand Books.

Q. What does that mean?

A. The Ampersand is the word for the and sign.

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H.G. Ross — Direct

Q. What is the address of your store?

A. 118 King Street, Alexandria, Virginia.

Q. Would you describe for me the geographic location, area that your store is located in.

A. It is down in the 100 block of King Street, which is — Well the 100 and 200 block of King Street are pretty much the best tourist area in Old Town, Alexandria, with mostly shops and restaurants in that area.

Q. Okay. And in what type of building are you located?

A. In a brick mall that is called the Small Mall, which has eight to ten little shops in the mall aside from my own.

Q. What king of shops are in the mall?

A. They have a plant store, a few gift shops, a deli, a toy store, things like that.

Q. And that mall I take it is open to the public?

A. Yes.

Q. Now, could you describe for the Court the physical layout of your store.

A. Well, the store is about 2,000 square feet, and is roughly rectangular, though with a lot of nooks and crannies here and there.

Q. Is all 2,000 feet devoted to the sale of books?

A. Well, we have a small stock room and two fairly small offices.

Q. Okay. And do you have any windows in your store?

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H.G. Ross — Direct

A. There are windows right on to the street, although the door opens into the mall itself.

Q. There is a window that faces on to King Street?

A. Yes, three.

Q. And then are there in addition other windows inside the mall?

A. Well, actually what we have is three doors, because we used to be three stores, but only one door is open to the public so, the other ones look like windows.

Q. In the window that opens to King Street, what use do you make of that window?

A. Well, right now we are displaying calendars hanging up in the window, and then we try to use our store as a display in itself so when people look in they can see the books that we have.

Q. Okay. With regard to the type of material that you sell in your store, putting aside — I take it, by the way, you sell books in the book store?

A. Yes.

Q. In addition to books, what other kinds of things do you have there?

A. We have records and tapes and stationery items.

Q. Okay. Now, with regard to the books, what type of book store is this? How would you categorize it?

A. General book store that sells books on pretty much all

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different kinds of subjects.

Q. How is your store arranged?

A. Mainly by subject matter. So that we — You know, in different sections which are labeled clearly. We have fiction, reference, biography, sociology, history, psychology, child care, juvenile, what have you.

Q. Approximately how many titles of books do you have in your inventory at any one time?

A. Well, we carry about 15,000 titles. We are out of stock on maybe 10 percent of them at any given time.

Q. So, it would be fair to say that at any one time in your store you have got maybe 12 or 13,000 different titles?

A. Yes, that would be fair.

Q. And you may have more than one copy of each of those titles?

A. Yes. It varies.

Q. And so, if we were talking about total number of books, how many do you think that might be?

A. Oh, heavens. Hard to tell. $100,000 worth, I know that, if that makes any idea.

Q. Do you sell books in your store for children and adolescents?

A. Yes.

Q. You have particular sections for those types of books?

A. Yes, we have a juvenile section.

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H.G. Ross—Direct

Q. Approximately what percent of your sales would you directly attribute to the sale of books in that category?

A. About 10 percent.

Q. Is it common for people under the age of 18 to come into your store?

A. Yes.

Q. Do you encourage them to come into your store?

A. Yes, of course.

Q. Why?

A. Well, for one reason, because I think that illiteracy is a big problem in America, and I think that exposing juveniles to books as early as possible is one of the best ways to combat that problem. And for another reason, they also sometimes make good customers, and quite often are coming in with their parents as a family group.

Q. And I guess young book buyers grow up, or young readers grow up to be book customers later on?

A. We certainly hope so.

Q. With regard to these 15,000 titles in your inventory, who selects the books that you purchase?

A. Well, I select most of them. I also have a manager, Peggy Page, who selects a certain number too.

Q. Would you describe for the Court briefly the selection process.

A. Most of our books are bought directly from publishers,

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H.G. Ross—Direct

A. I don't believe so, right now.

Q. Have you in the past had any employees under the age of 18?

A. Yes, we quite often have part-time high school students, especially at night and weekends.

Q. What king of duties would those part-time employees perform?

A. Well, helping customers first and foremost, ringing up the cash register, and then putting away books, and doing a lot of paperwork that the store has.

Q. Now, this is going to sound like a silly question, but I think it is necessary. Do you display books in your store?

A. Yes.

Q. What do you mean when you use the term display?

A. Well, of course there are different types of display. Actually we pretty much try to have all of our books out on the shelves, which could be considered displaying right

there, that they are available to the customer to walk up and find them. We also try to organize the store in such a way that it is easy for them to find them. And then we do do special displays on the side too, which points up certain books more than others.

Q. How are books, why is it important to display books in a way that customers can find them?

A. Well, for one think, customers tend to be hesitant to ask questions. Some customers will come right up and say, I

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down there that don't even know there is a book store, they get caught by our windows, they come in, they are looking around, that automatically they might not have thought of buying a book at all, and by browsing quite often they pick up a book and buy it. So, just for monetary reasons if nothing else.

Also, I really think that's one of the reasons I like owning a book store, is I like to encourage people to look at books and to read and to get interested in the books. So, it is the type of atmosphere I like to encourage.

Q. Okay. At some point did you become aware that Virginia had passed an amendment to an existing law that could impact upon your display of books?

A. Yes.

Q. Approximately when and how did you learn about that?

A. Well, actually the first week in July when I got a call from a member of the American Booksellers Association, and they explained what the law was about and said they would be sending me reading material. And I had heard of this type of law before, but I wasn't aware that Virginia was considering it.

Q. Okay. Did you later have an opportunity to review the amendment to that law?

A. Yes.

MR. PLOTKIN: Your Honor, at this time I would l like to ask the witness to be allowed to look at a copy of the amendment that is at issue here. I have had this marked as

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H.G. Ross—Direct

Plaintiffs' Exhibit 1. It is simply a copy of the amendment.

THE COURT: But she has testified that she has looked at it.

MR. PLOTKIN: Yes.

THE COURT: And you vouch the record that that is a verbatim copy of the amendment?

MR. PLOTKIN: Yes. It is actually a copy of what was attached to our complaint.

THE COURT: All right.

MR. PLOTKIN: I just thought she might have it there in case she wanted to, I am going to ask her some questions, and I thought she might want to reference it.

THE COURT: But you can hand it to her so that she will have it in front of her.

MR. PLOTKIN: All right.

Q. Are you aware that that amendment provides for criminal penalties for the knowing violation of the display provisions?

A. Yes.

Q. Have you ever been convicted of a crime?

A. No.

Q. Have you ever been arrested or charged with a crime?

A. No.

Q. Do you want to avoid criminal prosecution in running your business?

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A. Of course.

Q. If you were required to comply with that law, do you believe it would affect your ability to display books with pictures of nudity in it?

A. Yes.

Q. Do you believe it would affect your ability to display books with pictures of people engaged in some form of sexual conduct?

A. Yes.

Q. Do you believe it would affect your ability to display books that contained narrative descriptions of sexual conduct?

A. Yes.

Q. And do you believe that it would affect your ability to display books with narrative descriptions of nudity?

A. Yes.

Q. In your estimation, what percentage of your inventory would be included within this display provision?

A. A large percentage, maybe 30 to 50 percent.

Q. Would it include materials that are currently on the hard back and paperback best seller list?

A. Yes, definitely. Mainly fiction.

Q. Would it include books that fall within a category that I believe is referred to as romance?

A. Yes.

Q. Would it affect books that you have in your

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photography department?

A. Yes.

Q. In your art department?

A. Yes.

Q. In your health department?

A. Yes.

Q. In your—

MR. MCLEES: Your Honor, I would object for the record, unless this testimony is limited and there is an understanding this is being admitted just as her belief as to what this law would affect.

MR. PLOTKIN: No, she is relating it to that. She is testifying that this law would have that specific effect upon her business.

THE COURT: Well, your objection is overruled. It is a matter that you can explore on cross-examination.

MR. MCLEES: Very well, Your Honor.

THE COURT: Proceed.

Q. If you were forced to, if you had to comply with the display provisions that are contained in that Virginia law, have you given any consideration to the possible methods that you might explore in order to comply with the law?

A. Yes, we have certainly talked about them. And there doesn't seem to be any really viable way to comply totally with the law and to run the book store in a profitable manner.

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H.G. Ross Direct

about young adult. I don't know how you would get them there so they didn't see the rest of the books that might be on display.

And also, I mean, there is an awful lot of young kids that do go to science fiction, which is, you know, an iffy section too. Just general fiction, some literature that we have in our adult fiction section. It would be very, very hard to have just an adults only section that was totally separate from the rest of the store. It is just too mixed in with the rest of the content of the different sections.

Q. Would it also mean that you would have to review in a specific personal way each of the titles in your inventory?

A. Well, I suppose—

MR. MCLEES: Once again, Your Honor, I would object unless this is limited to her understanding or her belief of what she would have to do.

THE COURT: All right. With that condition, can you answer the question, Mrs. Ross?

THE WITNESS: Yes. From my understanding of the law, if I didn't knowingly realize that a book might have some harmful content in it, then maybe that wouldn't be a problem.

From just my general background of ten years in the book business, of course, there is an awful lot of books that I don't read that I could have a good idea might have some harmful comment in it. And again, as far as my estimates of

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H.G. Ross—Direct

what might be harmful to juveniles under this law, it is pretty much just based on my experience anyway. I don't know absolutely for sure which things would be considered harmful.

Q. Now, the answers to the questions that I am asking you here today are based specifically upon your knowledge of your book store at that location and your experience there and at Brentano's, I guess?

A. Yes.

Q. Thank you.

THE COURT: And the way in which you perceive that this statute would affect your business?

THE WITNESS: Yes.

THE COURT: All right.

Q. I am sorry, I think we were talking about partitioning the store. I was going to ask you, assume that you could in some way segregate out these books. Would it require you or someone on your staff to personally go through and make determinations as to which books went where?

A. Yes. I think we would have to make determinations, plus I don't quite understand whether or not you could allow juveniles in any other section in your store. It probably requires somebody from the staff supervising that particular section too versus the rest of the sections of the store, which would be pretty costly.

Q. Okay. Would it interfere with your ability to hire

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H.G. Ross—Direct

part-time clerks or other peopel under the age of 18, do you think?

A. Yes. I would say that I could not hire anybody under the age of 18. Because just in the general course of events, just opening up books that come from the publishers, then they would be handling books that might be construed to be against the statute.

Q. Okay. Are there any other methods that you have considered as potential ways for complying with the statute?

A. Well, cutting down on the inventory drastically I think again would pretty much make any book store unprofitable. If you have to cut off half of the best seller hard back and paperback fiction list, it would be very hard to make a profit in a book store. It is hard anyway.

Q. Would that also again require you to go through and do almost a book by book review?

A. Yes. I would think that would be the best thing I would do as a citizen, trying to comply with the law as fully as possible.

Q. Any idea how long it might take somebody to review— Let's say 10,000 titles, assume that you can maybe cut out the cooking books or gardening books?

A. Computer books.

Q. Or say 10,000 or 8,000 books, how long would it take someone to look through those to see if they had any

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spend an awful lot of money and time again buying that number of tags and walking around and putting them in books. Plus the type of tag that you could use. I mean, it would have to be something that would stay in the book, that wouldn't fall out, that wouldn't hurt the book when you put it in the pages. And the other thing is that it would

probably have to very clearly state why the tag was there. And it seems to me, again, that an awful lot of our customers would sort of recoil from a book that said that it was an adult only book, when it may be just something on health that it would have a description of sexuality or something in it.

Q. The Attorney General also suggested in his papers that stores could create a rack of adult only materials with a sign next to it that juveniles could not peruse this material. Would that be feasible in your store?

A. I would think that the way the law is written, it would be — It is too broad to be able to do just one rack or even one half of the store practically, just segregating it would be just too difficult, too confusing.

Q. Because of the 30 to 50 percent of the inventory that would be involved?

A. You would have to have two health sections, to [sic] psych sections, two fiction sections, two poetry sections. It would be a very strange way of setting up a store.

MR. PLOTKIN: Your Honor, what I propose to do, and

[42]

maybe to just save a little time, we have some books here that you

THE COURT: You just state

MR. PLOTKIN: I could just state them for the record and I could ask her a couple general questions.

THE COURT: And they will be received in evidence and given a designation.

Q. The first book is called American Couples by Blumstein, B-l-u-m-s-t-e-i-n, and Schwartz, S-c-h-w-a-r-t-z. Is that a book that you have removed from your store for purposes of this hearing?

A. Yes.

Q. And what section was this book located in?

A. Sociology.

Q. And in your review of this book do you believe that it contained narrative sexual descriptions that might run afoul of this amendment?

A. Yes.

Q. And therefore you would not be able to display this book in a place where minors could get it?

A. Correct.

Q. And there is, I would refer just for the record to pages 242 and 243. I don't think we need to read the material into the record, but just so that we have some specificity as to the kinds of things we are talking about.

[43]

H.G. Ross—Direct

Plaintiffs' Exhibit 3 is a paperback book by Jackie Collins entitled Hollywood Wives. Is this a book that was removed from your store?

A. Yes.

Q. And what section was this located in?

A. Fiction.

Q. And to the best of your knowledge, was this book over on the best seller list?

A. Yes.

Q. The New York Times best seller list?

A. Yes, it was.

Q. And I think in this book a reference to a page may be somewhat unnecessary, but I will give you 14 and 15 for the record.

Plaintiffs' Exhibit No. 4 is the Penguin Book of Love Poetry. Is this a book that you removed from your store for purposes of this hearing today?

A. Yes.

Q. And what section did this come from?

A. Poetry.

Q. And would you just describe for the record the cover of that book?

A. Well, the cover is from a painting definitely showing nudity in a woman.

Q. A man and a woman apparently embracing?

[44]

H.G. Ross—Direct

A. I think it is supposed to be—

Q. Child?

A. A God. But, yes.

Q. And we would for the record mark pages 112, a poem by D. H. Lawrence, and page 107. Maybe some others.

Plaintiffs' Exhibit 5 is called the Diamond Waterfall, and it is written by Pamela Haines, H-a-i-n-e-s. Is this a book that you removed from your store for purposes of this hearing?

A. Yes.

Q. And what section was this in?

A. In romance.

Q. Okay. And let me just read the page number out. Pages 44 and 45. And is there another reason why you selected that book as well?

A. Well, the cover does show some nudity between a man and a woman.

Q. Plaintiffs' Exhibit 6 is a book entitled The Family Of Woman, edited by Jerry Mason. Is this a book that you removed from your store to bring here today?

A. Yes.

Q. What section did this come from?

A. Photography.

Q. I would refer for the record — Well, it is unnumbered, these pages are not numbered, I will let the book speak for

[45]

H.G. Ross — Direct

itself.

Q. Plaintiffs' Exhibit 7 is a book entitled The New Our Bodies, Ourselves by the Boston Women's Health Book Collective. Is this a book that you removed from your store for purposes of this hearing?

A. Yes.

Q. And what section did this come from?

A. Health.

Q. And is there, to the best of your recollection, is there a chapter in this book on sexuality?

A. Yes.

Q. And it has specific references to such things as birth control and masturbation?

A. Yes.

Q. Plaintiffs' Exhibit 8 is a book by John Updike, U-p-d-i-k-e, entitled the Witches of Eastwick, one word. Is this a book that you removed from your store for this hearing?

A. Yes.

Q. And what department did this come from?

A. Well, it is in fiction and best sellers.

Q. This is currently on the paperback best seller list?

A. I believe so.

Q. And I would refer the Court to 126 and 127 of that book.

If I might have one moment. I think I am just about

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[48]

H.G. Ross—Cross

Q. They are arranged by author in fiction?

A. Yes.

Q. I see. Do you arrange books by publisher?

A. No.

Q. Just be subject matter and—

A. Not very often.

Q. And then within the subject matter by author?

A. Well, all of our sections are arranged differently. In something like a fiction section or mystery or romance, it is pretty much straight by author. In home arts it would be by the type individual subject, whether it is carpentry or sowing [sic] or what have you.

Q. I see. Now, when you receive a book and unpack it and put it on the shelf, how do you determine what section to put it in?

A. Well, sometimes you know instantly just by looking at it by the title. Sometimes you have to look inside the fly leaf for a description of it or on the back of the book for a description of the content of the book. Or we have a card system where every title in our store is on a card, and the section that it should go in is labeled on that card. And if

one of our employees is very confused, they can go to the publisher and find that card and figure out where to put it.

Q. Who prepares the cards?

A. Well, all employees prepare the cards.

* * * * *

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H.G. Ross—Cross

be a western, don't you? Or Ludlum, it is going to be a mystery?

THE WITNESS: Yes. Quite often when we are talking to the sales rep— I mean, there is some books that I don't buy because there is no normal section to put it in and I can't see where to display it. But most of the time if there is a question, I would ask them where they would best display it. And there are certain books of course that get in the wrong place. We always have fights over sociology versus history, but why—

Q. I can understand that, I think I would too. Isn't it fair to say that generally from looking at the book, looking at the fly leaf or the back cover, you can tell the subject matter of the book?

A. Yes, generally.

Q. And if you can't, can you talk to the publisher and find out what the general subject matter is?

A. Oh, sure. I can figure it out. I have certain employees that have trouble figuring it out.

Q. Now, you believe, correct me if I am wrong, but you believe that this law, this amendment that was passed, would prohibit you from displaying in your store books that contain a, either a narrative description of sexual conduct or a photograph depicting human nudity, is that correct?

A. Yes, the way I read the law.

[51]

H.G. Ross – Cross

Q. Is that because that's what you believe harmful to juveniles, that's what you believe is harmful to juveniles?

A. Not necessarily my opinion.

Q. You don't believe that a picture, a photograph of human nudity is necessarily harmful to juveniles?

A. Not necessarily.

Q. And you don't believe that descriptions of sexual conduct are necessarily harmful to juveniles?

A. It could be.

Q. But not necessarily?

A. Not necessarily.

Q. Some are and some aren't?

A. Well, right. Certainly some I would not sell to a juvenile.

Q. What books wouldn't you sell to a juvenile?

A. That is getting very specific. Certainly — Well, there is a certain group of books that we get from Grove Press that are Victorian, pretty much old fashioned pornography.

Q. Is Venus in The Country by Anonymous?

A. I would definitely not sell that to a juvenile.

Q. You do sell that in your store though?

A. Yes.

Q. And is A Man With A Maid by Anonymous one of those books also?

A. Yes. I would say anybody by that famous author.

[52]

H.G. Ross—Cross

Anonymous, I would not sell to a juvenile.

Q. You do sell that in your store?

A. Yes.

Q. Where are they located in your store?

A. In the fiction section.

Q. How many different shelves are they on?

A. One, I think. It is about half a shelf.

Q. And is it fair to say by looking at the cover of A Man With A Maid and reading the back of the book, that you or I, I dare say anyone on your staff, could tell that this was a sexually oriented book?

A. Yes.

Q. And you wouldn't sell that to a juvenile?

A. No.

Q. That is because do you believe this is harmful to juveniles?

A. I would feel very uncomfortable having my nephews reading that, yes.

Q. Now, the books that Mr. Plotkin has read into the record and you referred to on direct examination, do you believe they are harmful to juveniles?

A. I don't think I would sell Jackie Collins to a juvenile. American Couples, they would never even try to buy. I mean, it is very hard. I really think that a lot of that depends upon their parent. And I would leave many decisions of

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[54]

A. Sure, if I can find it.

MR. PLOTKIN: Your Honor, I am going to, I would like to inquire as to the relevancy as to this line of questioning.

THE COURT: But the proper objection is that I don't allow discovery on an in-trial setting, and this is exactly what that is. So, if you object to it, I will order her to return it to you.

MR. PLOTKIN: I object.

THE COURT: Marshall, return it to counsel. But I do not permit discovery when I am presiding over an evidentiary hearing.

MR. MCLEES: I will withdraw that.

THE COURT: All right.

MR. MCLEES: Thank you, Mrs. Ross.

BY MR. MCLEES: (Continuing)

Q. Did the— In addition to the material you received from American Booksellers, who else, if anyone, told you what this law would mean or told you that it would outlaw nudity and descriptions of sexual conduct?

A. Well, actually I read the law myself. I mean, some of it seems—

Q. You concluded that from reading the law that has been introduced into evidence?

A. Yeah. I mean, that's what it says, I think.

[55]

H.G. Ross—Cross

Q. What does it say about what is harmful to juveniles?

A. Well, of course that's one of the problems with the law in general as well as the amendment, is that that is extremely difficult to know what harmful to juveniles is.

Q. Do you know what the legal definition of harmful to juveniles is?

A. No.

Q. Has anyone read that to you?

A. No. Is there one?

THE COURT: It is in paragraph six.

MR. MCLEES: That's correct.

Q. Did anyone read that to you?

A. A separate legal definition of harmful to juveniles?

Q. Yes.

A. No.

Q. No one ever told you that there was one, did they?

A. I don't know. Not that I remember. What is the legal definition?

Q. Mrs. Ross—

THE COURT: Don't waste my time on that. It is in the statute. And those are legal arguments. We are here now to fleshen out the record from an evidentiary standpoint.

Q. You believe, Mrs. Ross, that you would have to remove books of the type that you have referred to that you brought here today—

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H.G. Ross—Cross

A. I believe I would have to seriously consider it if I wanted to be in line with the law.

Q. And in addition to that, 30 to 50 percent I believe you said of your inventory you would be concerned with?

A. It would have to come under heavy scrutiny, yes.

Q. Do you believe that any of the books that you have brought today when taken as a whole predominantly appeal to the prurient interest of a juvenile?

A. Well, things like Our Bodies, Ourselves, the type of thing I have stopped teen-age kids from looking through, things like that, and pregnancy and child birth and things in the child care section just because of the pictures. I don't think they would probably pick up the Penguin Book of Love Poetry.

Q. The book, Our Bodies, Ourselves and pregnancy and child birth, do you believe that they have scientific value or any other kind of value for juveniles?

A. Well, they have values for people in general that most juveniles are too young to get value out of them right at that time.

Q. Well, apart from very young juveniles, you believe that juveniles in general can get some scientific value from books like that?

A. Out of parts of them, yes.

Q. Are you aware that there has been a law on the books for years that makes it illegal for you to sell books to

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H.G. Ross—Cross

juveniles that are harmful to juveniles?

A. It is this law without the amendment.

Q. You are aware that that has been the law for years?

A. That that was the law, yes. I had not read it before, but I have now.

Q. And what— And I assume you have been trying to comply with that law?

A. Well, except for I hadn't read it. But I certainly tried to comply with, I knew that there was a pornography law in the State of Virginia, and I tried to use good sense in complying with it. I never called for a copy of it.

Q. What books in your store have you refused to sell to juveniles?

A. Actually the matter has never arisen. The store seems to have an atmosphere that does not encourage juveniles to try to come up to buy books that might be really out of line for them to buy.

MR. MCLEES: Your Honor, I would move—

THE COURT: They will be received in evidence and marked as Defendants' Exhibits 1 and 2.

Marshal, hand them to the deputy clerk.

MR. MCLEES: I have nothing further.

THE COURT: Mrs. Ross, you may stand down. There is no need for any redirect on it.

NOTE: The witness stood down.

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THE COURT: Call your next witness.

MR. PLOTKIN: As plaintiffs' next witness, Your Honor, we would call Mrs. Heather Florence.

THE COURT: Now, to what extent will this be cumulative of what you have already put on?

MR. PLOTKIN: I don't believe it will be cumulative at all, because this witness is not a book seller She is someone involved from the publishing end of it. And with

the Court's permission, just in the, in our spirit of dividing up some of the work, I would ask the Court to allow Mr. Bamberger to conduct the examination.

THE COURT: Certainly, no problem.

NOTE: The witness is sworn.

HEATHER GRANT FLORENCE, a witness called by counsel for the plaintiffs, first being duly sworn, testifies and states:

DIRECT EXAMINATION

BY MR. BAMBERGER:

Q. Mrs. Florence, would you please state your full name for the Court.

A. Heather, H-e-a-t-h-e-r, middle name Grant, G-r-a-n-t, last name F-l-o-r-e-n-c-e.

Q. Where do you reside, Mrs. Florence?

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A. Connecticut.

Q. And what is your present occupation?

A. I am a vice-president and the general counsel of Bantam Books.

Q. Mrs. Florence, are you married?

A. Yes, I am.

Q. Do you have any children?

A. Yes, I do.

Q. How many and of what age and sex?

A. I have one son who is six-and-a-half, just started second grade.

Q. Would you please describe to the Court your education.

A. After completing public high school I went to Radcliffe College where I received a B.A., magna cum laude. And then went to the Columbia Law School in New York and got a J.D. degree. That's the extent of it.

Q. When you completed law school, what did you do then?

A. I went into the private practice of law as an associate in the law firm in New York City of Weil, Gotshal and Manges. That was my first job.

Q. How long were you with that firm?

A. I was associated with that firm approximately five years.

Q. And what was your next business employment?

A. I went to another law firm in New York, Lankenau

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H.G. Florence—Direct

Q. Is Bantam Books a member of that association?

A. Yes, it is.

Q. Would you describe your present duties with Bantam Books, please.

A. Well, in my capacity as the—

THE COURT: Counsel, this has been interesting, but you have about burned it out. Let's move on to issues that are germane to this case immediately.

MR. BAMBERGER: Yes, Your Honor.

Q. Would you please describe to us the range and nature of material published by Bantam Books.

A. Bantam publishes books in a manner of formats; hard cover recently, traditionally only paperback books. We publish all sizes of books, oversized, and most of our books are rack size, mass market, paperback books. We publish approximately 50 to 60 different titles every single month, comes out over three to 400 titles a year. And the range of subject matters and age levels is very extensive.

Q. Do you publish both original works and reprints of hard cover books?

A. Yes. Our paperback line is composed of reprints of hard cover books that we have published and that other publishers first published in hard cover, and also a number of books that are published for the first time in paperback which we call originals.

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you apply that standard to manuscripts coming into Bantam Books and advise them whether or not the books could be freely sold, freely displayed in the Commonwealth of Virginia?

MR. MCLEES: Objection, Your Honor, relevancy.

THE COURT: The objection is overruled.

A. Well, I could find it virtually impossible to do that apart from perhaps using an educated or knowledgeable guess as to what would fall within the statute, which is difficult. It would be a monumental task. It would really require reading probably 90 percent of the fiction titles that come through the house, and probably about 25 percent of the nonfiction titles. And it would be virtually impossible to get that much work done in my apartment.

MR. BAMBERGER: I have no further questions.

THE COURT: Cross-examination, Mr. McLees?

MR. MCLEES: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. MCLEES:

Q. Mrs. Florence, since you advise your employer on First Amendment issues, I presume you are aware that there, there is and has been for several years in Virginia a law prohibiting the sale to juveniles of materials that are harmful to juveniles?

A. I am aware that such a law exists in many states. And

[66]

H.G. Florence—Cross

I was not particularly aware that there was one in Virginia, but I am aware that those laws exist, and our books are distributed nationwide. So, for all intents and purposes, yes.

Q. And you are aware that the same definition of harmful to juveniles that counsel showed you a few minutes ago is the definition that is used in Virginia and many other states?

A. It is.

Q. In those laws forbidding the sale of materials of that sort to juveniles?

A. Yes.

Q. And I am sure in your duties you have advised your employer concerning what books can be sold to juveniles, haven't you?

A. Actually I have never had the need to since my employer is not in the retail end of the business. And the only books that are clearly directed to a juvenile audience, we do have a large young reader publishing program, would, based on the editorial selection of that material, not contain matter which is defined as harmful to juveniles. So, it has never arisen for me.

Q. So, the matter has never arisen. Your employer doesn't make a practice then of advising retailers that buy Bantam Books what books can be sold to juveniles or not?

A. It is certainly not our practice from a legal standpoint. I believe that when our sales representatives

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C. Johnson — Direct

CAROL JOHNSON, a witness called by counsel for the plaintiffs, first being duly sworn, testifies and states:

DIRECT EXAMINATION

BY MR. PLOTKIN:

Q. Would you state your name and address for the record, please.

A. Carol Johnson, I live in Arlington, Virginia.

Q. Are you one of the named plaintiffs in this lawsuit?

A. Yes, I am.

Q. How long have you lived in Arlington?

A. 17 years.

Q. Are you married?

A. Yes.

Q. Do you have children?

A. Yes.

Q. How many?

A. Two, in the Arlington school system.

Q. And their ages?

A. Almost 12 and almost 16.

Q. And what is your present occupation?

A. I am owner manager of Books Unlimted in Arlington, Virginia.

THE COURT: Of which?

THE WITNESS: Books Unlimited.

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C. Johnson—Direct

Q. Mrs. Johnson, you might want to lean forward a little bit because we are having a little difficulty picking up your voice.

A. How is that?

Q. Fine. How long have you owned Books Unlimited?

A. Ten years.

Q. And are you a member of the American Booksellers Association?

A. Yes, I am.

Q. Would you describe the geographic location of your store.

A. We are located in the Clarendon section of Arlington. Clarendon was the original central business district in Arlington, and it is now under a great deal of reorganization and redevelopment. It is a very interesting neighborhood. We have a lot of ethnic restraurants. We have a wonderful baby furniture store next door, a big Sears across the street. A nice neighborhood directly behind us. We have a park three blocks away. We have a large elementary school six blocks away. We have a lot of walk-in traffic.

Q. Okay. Would you describe the size and the physical layout of your store.

A. About 1200 square feet of selling space, 150 or 200 in the back room. It is very long and narrow. As you walk in the front door, there are two alcoves directly behind you, they

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C. Johnson Direct

have big picture windows that are visible from the street. The rest of the layout of the store, there are floor to ceiling book shelves as you walk down, with a central counter. And then about half way down the store there are little like library stacks, and then more floor to ceiling shelving in the back.

Q. And would you describe for the Court the way your inventory is organized.

A. By subject matter. And then as a general rule, in alphabetical order by author within the subject matter, except where it doesn't fit.

Q. And you heard Mrs. Ross testify earlier about her store was organized into different subject materials?

A. Right.

Q. And so forth. Would you generally adopt that

A. Everybody has their own system, but we have mental health, parenting, biography, history, best seller, new releases, science fiction, everything.

Q. Okay, thank you. Is your store open to minors?

A. Absolutely.

Q. What percent of your sales occur in your children and young adult books?

A. 40 percent of our sales annually are from the children's section.

Q. And what percentage of your inventory would you

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C. Johnson—Direct

and some elementary schools.

Q. Do you have a special section for young adults?

A. Yes, I do, a large one.

Q. Why?

A. My children are older now and I am interested in young adult literature more so than I was when I first got started. There is a lot of really good literature.

Q. I take it in the store where you are located, you don't lump all the children's books in one section?

A. No. It is a very large section, so that I have divided it up.

Q. What types of books are located in the young adult section?

A. In the young adult section it is almost entirely fiction. We figure that by the time the children are designated as young adults, they pretty much have the run of the store for nonfiction items.

Q. What age would you think of as being young adults for purposes of that?

A. 12 up, 12 to 18.

Q. Are there, in the books that are contained in the young adult sections, are there references in some of those books to sexual conduct?

A. Yes, there are.

Q. Are there references or are there pictures of nudity,

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C. Johnson—Direct

human nudity in those books?

A. No, not in those books, no pictures.

Q. Do you have a section on science fiction?

A. Yes.

Q. Are those books popular with young readers?

A. Very.

Q. Do some of the science fiction titles contain narrative descriptions of sexual conduct?

A. Absolutely.

Q. Do you carry books known as best sellers?

A. Yes.

Q. And do any of those books contain discussions of sexual conduct?

A. As far as I know, yes.

Q. And you have a section on mystery and suspense?

A. Yes.

Q. Do those books contain discussions—

A. Yes.

Q. Have you ever refused to sell a book to a juvenile?

A. Yes.

Q. Why?

A. Mainly because I thought they were too young for the material that they brought up to counter. Several times I have refused to sell Judy Blume Forever without a note from their parents.

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C. Johnson—Direct

Q. And that is a decision— How would you make a decision as to whether or not to sell a particular book to a particular individual?

A. Arbitrarily. I am a parent, and I would just make that decision as a parent.

Q. And would you make that in the context of somebody coming forward to the counter and handing you a book that they wanted to purchase?

A. Yes. I even refused to sell Forever to her parent because I thought her child was too young, and she wrote me a letter of thanks afterwards.

Q. Who selects the books for your inventory?

A. I do 90 to 95 percent of my buying.

Q. How many titles do you have in your inventory?

A. 15 to 20,000.

Q. Do you employ any people under the age of 18 as did Mrs. Ross?

A. Yes.

Q. And would they conduct the similar kinds of duties that she described?

A. They do everything, yeah, I mean everything but buy and make any kind of financial decisions, yes. It is a small store, they have to pull their weight.

Q. I take it like Mrs. Ross you display books in your store?

[75]

C. Johnson — Direct

A. Yes.

Q. How do you display them, what methods do you use?

A. Because I have a small space and so many titles, some of the books are face out, many more of them are spine out. But they are available, as many as I can, at eye level, and the rest within easy reach of the hand all along the shelves.

Q. Why is that important?

A. Sometimes there is only one of us manning the store, but even when there are three of us, we are very likely to be busy with customers or the telephone or the cash register. And so, for practical purposes it is necessary for customers to do their own shopping. Plus they pick up things, you know, that we wouldn't imagine they are interested in if they are just allowed to wander around.

Q. Did there come a time when you learned that Virginia had passed a law that might impact upon your ability to display certain books?

A. Yes.

Q. When was that and how did you come to find out about it?

A. It was the week before it went into effect, and I was contacted by the media coalition from the ABA. But I knew it was coming since I had been reading about it.

Q. Have you since had an opportunity to read the law?

A. Yes.

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C. Johnson—Direct

Q. If you were required to comply with the law, would it have any impact on your ability to display books in your store?

A. I think it would have a tremendous impact.

Q. Why?

A. Because so much of my business is done with juveniles. Because I have, I have classes coming into my store as a field trip from schools. And if I was worried about what I have on the shelf, I would have to say that they couldn't do that anymore.

Q. Can you estimate for the Court what percentage of your inventory might fall within the purview of the display requirements?

A. It would be less than Helen's because so much of it is children's, but I would think that maybe up to 30 percent.

Q. Do you know that it is a crime to violate the display provisions?

A. Yes.

Q. Have you ever been convicted of a crime?

A. No.

Q. If you were forced to comply with these display provisions, what options might be available to you? I take it you heard Mrs. Ross testify about the options that she had available. Do you think it might require you to remove books from—

A. I do. And I think it would require me to greatly

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C. Johnson—Direct

tailor the way that I buy new books.

Q. In what sense?

A. Well, not all the books that you buy come from a publisher representatives' sales pitch. A lot of them just come from picking things up off of lists. And it is very difficult from reading a list to know what the contents of a book is, and you would really just have to leave out everything you couldn't ask questions about.

Q. Would it be possible for you to go around and put special tags on the books that you thought might be potentially covered by this law?

A. It would be very difficult to know which books to put tags on. Where I had an inkling, I would hate to pull, I would hate for the people to think that I have adults only

books in my stores since they think of it as a family neighborhood book store.

Q. I take it, however, you do have some books that you would consider, certainly consider as being for adults only?

A. Yes, certainly.

Q. Do you have some of those Anonymous books that are referred to?

A. Yes.

Q. By the way, are the all Anonymous books grouped together?

A. Yes.

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C. Johnson - Direct

Q. Is that because the author's first name begins with A?

A. That's not why. Some of them have real authors.

Q. Do you believe that the removal, if you had to remove any books from your store or restricted your buying of titles, that would put you at any competitive disadvantage?

A. Absolutely.

Q. Why?

A. It is hard enough to compete as an independent book seller with the likes of Crown, and they operate area wide. So that if they had to comply with the law in Virginia, they wouldn't have to comply with it in the District and Maryland. That alone is difficult. And then we would have to be competing with other book stores in the District and Maryland who didn't have to comply with the law. We would have to pull best sellers and they wouldn't have to.

Q. I have some books here that we removed, that you removed from the shelves of your book stores, is that correct?

A. Yes.

Q. Each of these books are books that are on display in your store?

A. Yes.

Q. Plaintiffs' Exhibit 9 is a book called Am I Normal, by Jeanne Betancourt, B-e-t-a-n-c-o-u-r-t, an illustrated guide to your changing body. Why do you think this book, you would not be permitted to display this book?

[79]

C. Johnson Direct

A. It shows male nudity.

Q. And is this a book that is specifically designed for adolescents—

A. 12 to 14 year olds, yes.

Q. Plaintiffs' Exhibit 10 is entitled Changing Bodies, Changing Lives, by Ruth Bell and others. Do you believe that you would have some restrictions on your ability to display this book?

A. Yes, I do.

Q. Why?

A. Well, aside from pictures of nudity in there, there is a great deal of sexual description on puberty and teenage sex.

Q. Is this a book again designed primarily for adolescent readers?

A. Yes.

Q. Plaintiffs' Exhibit 11 I think you have alluded to this earlier, it is entitled Forever, by Judy Blume, B-l-u-m-e. Is this a book that you feel you might be prohibited from displaying?

A. Absolutely.

Q. Why?

A. There is quite graphic descriptions of first sexual encounter in the book.

Q. And again, what audience is this book targeted at?

A. Young adults, I would say 14 and up.

[80]

C. Johnson – Direct

Q. Lord Foul's Bane by Stephen R. Donaldson, Plaintiffs' Exhibit 12. Why do you—

A. There is a graphic description of rape in it that is crucial – It is a series of 2,000 pages, it is six books, very popular science fiction.

Q. Plaintiffs' Exhibit 13, entitled Lucifer's Hammer by Larry Niven and Jerry Pournelle, P-o-u-r-n-e-l-l-e. Why do you think you would be restricted from displaying this book?

A. Again, there is sexual content.

Q. And would that be on pages 66 and 67?

A. I think so, yes.

Q. Tender Is The Storm by Johanna Lindsey, Plaintiffs' Exhibit 14. Why—

A. That's because of the cover.

Q. I am sorry, what about the cover?

A. It is male nudity again, rather graphic.

Q. Plaintiffs' Exhibit 15, The Facts of Love by Alex Comfort and Jane Comfort. Why do you think you would have restrictions—

A. Again descriptions of the sexual act as well as pictures. Nudity.

Q. And again, what audience is this book targetted for?

A. Young adults.

Q. Plaintiffs' Exhibit 17, Where Do Babies Come From by Margaret Sheffield, S-h-e-f-f-i-e-l-d. Why do you think that

[81]

you would have trouble displaying this?

A. There are fairly graphic pictures in there. They are lyrically done, but they are fairly graphic.

Q. Do you believe that some of the material that we have just reviewed here are appropriate for older teen-agers, but yet might be harmful for younger children?

A. Yes, I do.

Q. Why?

A. Well, younger kids are just not ready for the information that is involved. Most of the narrative information, the pictures they are just going to titter over, but I think some of the narratives they are just not ready for that kind of information yet. And it is a decision their parents should make with them.

Q. Do you believe that each one of these books or any of these books are necessarily harmful to juveniles?

A. I do not. But someone else might.

Q. And why is it that you would then consider them to be covered by these display provisions?

A. Just because I don't know who's definition of harmful I am to use. And to be safe, I would have to pull them.

MR. PLOTKIN: I have no further questions of this witness.

THE COURT: Cross-examination, Mr. McLees?

MR. MCLEES: Thank you, Your Honor.

[82]

C. Johnson—Cross

CROSS-EXAMINATION

BY MR. MCLEES:

Q. Mrs. Johnson, do I understand correctly that you believe that this law, this amendment that we are here about, would prohibit you from displaying in your store any book that has a verbal description of sexual conduct or contains a photograph or a picture of human nudity?

A. Pretty much.

Q. Is that correct?

A. Yeah.

Q. Who told you that?

A. I read the law.

Q. Did you read the definition of harmful to juveniles?

A. No, that was not included in—

Q. It wasn't included in the material that was sent to you?

A. I don't believe so.

Q. Did you know there was a legal definition of harmful to juveniles?

A. No. I mean—Yes, I guess I assumed there was, but I hadn't read it.

Q. But you didn't know what it was?

A. No.

Q. Now, you have mentioned a figure I believe that you gave was maybe 30 percent of your inventory would be affected

[83]

C. Johnson - Cross

by this law?

A. Possibly.

Q. And that's because - Do you believe that 30 percent of your inventory is harmful to juveniles?

A. I said up to 30 percent.

Q. Do you believe up to 30 percent?

A. No.

Q. You don't believe it is harmful?

A. No.

Q. But it is your belief that it might come under this law?

A. Sure.

Q. Who do you think under this law will determine what is harmful to juveniles?

A. I would assume it would be the public if there were a complaint, then someone might follow-up on it.

Q. What would happen in your understanding if they followed up on it?

A. I suppose I could be taken to court.

Q. Are you aware that before you could be charged with a violation of this law, a neutral judicial officer would have to find that there was probably cause to believe that the book in question met the legal definition of harmful to juveniles?

A. No, I was not aware of that.

Q. Are you aware that before you could be convicted of

[84]

C. Johnson - Cross

violating this law, you would have a right to have a jury of 12 ordinary people from your community decide whether they were convinced beyond a reasonable doubt that the material that was sold was harmful to juveniles under the legal definition?

A. No.

Q. You were not aware of that?

A. Not explicitly aware, no.

Q. What percentage of your inventory predominantly appeals to the prurient interests of juveniles?

A. Well, I would have no idea.

Q. A large percentage, a small percentage?

A. Probably a very small percentage. Every once in awhile I have to take a book out of the hands of someone, but a very small percentage.

Q. What books do you take out of the hands of someone?

A. The Joy of Sex mostly.

Q. And whose hands do you take that out of?

A. Juveniles.

Q. I see. In your store?

A. Sure.

Q. If they pick it up and peruse it?

A. Yes. Mostly my own children back when I first started, but others included, yes.

Q. Now, what about The Gardens of the Night by Anonymous? You sell that in your store, don't you?

[85]

C. Johnson - Cross

A. No, probably not. I don't keep real close track of those titles.

Q. You do sell books by Anonymous published by Grove Press, don't you?

A. Some of them, sure.

Q. Comparable to this?

A. Comparable.

Q. What about Venus Unbound by Anonymous, you do sell that, don't you?

A. Maybe, possibly.

Q. That's also Grove Press, Anonymous, and you sell books comparable?

A. Some of them, yes.

Q. Do you sell them to juveniles?

A. No.

Q. If juveniles come into your store and pick those up and leaf through them and read them, do you allow them to do that?

A. It has never happened, to my knowledge.

Q. Where are they displayed in the store?

A. In with the books on sex, with the books on sex education.

Q. Do you consider that to be sex education?

A. No, but I keep them away from fiction so that I can keep an eye on them.

[86]

C. Johnson - Cross

Q. What do you consider these Grove Press Anonymous books to be if they are not sex education?

A. Fantasy material.

Q. Now, the books that Mr. Plotkin referred to and that you have brought here today, do you believe they are harmful to juveniles?

A. I believe someone could say that they were, could feel that they were, yes.

Q. Well, let's not, let's not talk about what someone could say. Let's talk about your belief about these books. Do you believe that Where Do Babies Come From by Margaret Sheffield, do you agree that that is lacking in serious literary or artistic or political or scientific value for juveniles?

A. No.

Q. What about The Facts of Love, do you believe that is lacking in serious literary or scientific value for juveniles?

MR. PLOTKIN: I would like to inquire as to what age group we are talking about.

THE COURT: Young adults. Do you want to plug that in, because that is the audience that we are basically talking about.

THE WITNESS: Well, there are even younger children.

MR. MCLEES: Your Honor, it would be our position that legally that is irrelevant.

[87]

C. Johnson - Cross

THE COURT: All right.

Q. What about Changing Bodies, Changing Lives. Do you believe that that is lacking, taken as a whole, lacking in serious literary or scientific value for children?

A. I do not believe that. But I think that it could be harmful to certain children.

Q. It could be harmful, you believe it could be harmful to certain children?

A. Sure.

Q. But you don't believe it is lacking in serious scientific value for children?

A. No.

Q. Now, you mentioned Lord Foul's Bane, I believe that is one of these books also?

A. Yes.

Q. That's a series of six books?

A. Yes, six.

Q. And it has a total of 2,000 pages?

A. Yes. I read it.

Q. And do you sell that to children?

A. I use a lot of judgment with that, because of the rape in the first book.

Q. Now, this rape in the first book is the reason that you feel that under this law you wouldn't be able to display that book?

[88]

C. Johnson – Cross

A. Yes.

Q. How many pages does that rape take up?

A. I don't remember.

Q. Two or three?

A. Maybe longer.

Q. More than ten?

A. Maybe not.

Q. Probably not. More than 15?

A. Around that, probably.

Q. Out of 2,000 pages? Could you give a verbal response please for the benefit of the court reporter?

A. Yes.

Q. You mentioned Judy Blume's book Forever, that you didn't sell that to juveniles, is that right?

A. Well now, what is the definition of juveniles? I do sell it to young adults.

THE COURT: Anyone under 18 as I read the statute.

THE WITNESS: Of course I sell that to juveniles, but I don't sell it to anyone who I think is too immature to read it.

Q. Why?

A. That's the parent in me, I don't think they are ready.

Q. Well, what is it about that book that they are not ready for?

A. There is quite a lot of graphic sexual description

* * * * *

[93]

C. Johnson - Cross

A. I have no idea. A tenth of a percent. Half a shelf.

Q. Are you aware that there has been a law on the books for several years making it legal to sell certain books to juveniles?

A. Yes.

Q. Sexually oriented?

A. Right.

Q. And you have tried to comply with that law?

A. Certainly.

Q. Have you ever been arrested for violating that law?

A. No.

MR. MCLEES: Thank you, nothing further.

MR. PLOTKIN: No further questions, Your Honor.

THE COURT: Thank you, Mrs. Johnson, you may return to your see [sic].

THE COURT: Does that conclude your evidence.

MR. PLOTKIN: Yes, it does, Your Honor. At this time I would like to move the admission of the books that we have submitted into evidence.

THE COURT: All of the books that you made reference to or use of here in the trial are received in evidence.

MR. MCLEES: We would move ours in as defense exhibits.

THE COURT: Bring those up, Marshal. Then that concludes the evidence. I am going to have to write a memorandum opinion in the case. I understand it, and I read

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

AMERICAN BOOKSELLERS
ASSOCIATION, et al.,
Plaintiffs,

v. CIVIL ACTION NO. 85-816-A

CHARLES T. STROBEL,
DIRECTOR, PUBLIC SAFETY, et al.,
Defendants.

ORDER

This matter is before the Court on plaintiffs' application for costs, pursuant to 42 U.S.C. 1988. Defendants have objected to plaintiffs' application and have requested that the fees demanded be reduced. For the reasons stated below, the Court DENIES plaintiff's application and disallows all fees.

The Civil Rights Attorney's Fees Awards Act of 1976 provides that in any action under 42 U.S.C. Section 1983, the district court, "in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. Section 1988. In exercising its discretion, the court is controlled by the standard set forth in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968). Under that standard, a prevailing plaintiff "should ordinarily recover an attorney's fees unless special circumstances would render such an award unjust." 390 U.S. at 402. *See also Bonnes v. Long*, 599 F.2d 1316, 1318 (4th Cir. 1979). In this case, the Court finds just such special circumstances.

This case, *American Booksellers*, was a carefully orchestrated attack on a Virginia statute. The statute at issue made it unlawful to display commercially certain materials

deemed harmful to juveniles in such a manner that children could examine and peruse them. *See* Sections 18.2-390 to 391 of the Virginia Code. This statute peculiarly affected one entity, the bookselling industry, and it was that industry that masterminded the assault. Through its attorneys, the industry carefully selected a broad spectrum of litigants to ensure standing. The original plaintiffs included five bookstore trade associations, two individual bookstores and two individual residents of the City of Alexandria. It chose a forum it considered desirable, *i.e.*, one of the more liberal sections of the state, where success at trial was more likely but where actual enforcement of the statue was considerably less likely. And, perhaps most importantly, it filed a 1983 action, even though a declaratory action based on the First Amendment itself would have been more than sufficient. The added attraction of 1983, of course, was the provision for attorneys fees.

When the battle was over and the statute struck down, the beneficiary was, once again, the bookselling industry. With the statute on the books, the industry had faced a massive loss of profits but, through this suit, it managed to protect these revenues. In other words, from the beginning, this case was a suit by a private industry, for a private industry. It is that industry that should now bear the expense, simply as a cost of doing business. To do otherwise would be unfair. The taxpayers should not have to bear the expense of a suit that redounded to the benefit of one industry and one industry alone.

The Court does not mean to suggest that the bookselling industry acted improperly in bringing this case. Nor does it mean to downgrade the importance of this case or the principles it upholds. Freedom of speech and thoughts are of paramount importance and admittedly work to everyone's benefit. However, to the extent that the public benefited, it can pay for that benefit through a one or two cent increase in the price of books. This would effectively spread the cost of the suit and seems more equitable than saddling the State with the bill. The State here acted in good faith, in support of a cause that all must find worthy—the

protection of children. Moreover, the State could not have known that its actions would be found to be unconstitutional since this is a novel area of law.

The Court realizes that probably none of these factors standing alone would justify shielding the State from paying attorney fees. For instance, the law is clear that good faith by itself is not a special circumstance that would make an award of attorney fees unjust. *See, e.g., Anderson v. Morris*, 658 F.2d 246 (4th Cir. 1976). However, with all these factors combined, the Court finds it more equitable to let the costs lie where they land. Those who have benefited the most (which includes the book-buying public) will pay the slight cost of that benefit, and the State will not be penalized for its well-intentioned effort to protect its children.

Let the Clerk send a copy of this order to all counsel of record.

DATE: Oct. 23, 1985

/s/ Richard L. Williams
UNITED STATES DISTRICT JUDGE